84-1824

NO. _____

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

TERRY C. KNAPP, Plaintiff-Appellee,

v.

HARRY WHITAKER, RUSSELL McDAVID, JOHN HATTON, PEORIA SCHOOL DISTRICT NO. 150, a body politic and corporate, and GEORGE BURDETTE, Defendants-Appellants.

On Appeal From The United States Court Of Appeals For The Seventh Circuit

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JURISDICTIONAL STATEMENT

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May 18, 1985

11 pp

QUESTIONS PRESENTED

1. Does a school board policy requiring teachers to follow the chain of command on personal matters violate First Amendment rights?

2. Where there are legitimate, non-discriminatory reasons for the governmental action, e.g. Plaintiff's phlebitis, substantiated by the evidence which are not shown to be pretextual, can a jury verdict for Plaintiff be allowed to stand?

3. Are the parties' rights under the Seventh Amendment violated where there has been an excessive and unreasonable jury verdict remanded to the District Judge to "review the trial record, 'assess the jurors' probable reaction' to the equitable relief, and recalculate the compensatory damage award"?

LIST OF PARTIES

All of the parties in the United States Court of Appeals for the Seventh Circuit are listed in the caption.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

TERRY C. KNAPP, Plaintiff-Appellee,

v.

HARRY WHITAKER, RUSSELL McDAVID, JOHN HATTON, PEORIA SCHOOL DISTRICT NO. 150, a body politic and corporate, and GEORGE BURDETTE, Defendants-Appellants.

On Appeal From The United States Court Of Appeals For The Seventh Circuit

JURISDICTIONAL STATEMENT

Harry Whitaker, Russell McDavid, John Hatton, Peoria School District No. 150, a body politic and corporate, and George Burdette, respectfully appeal from the judgment of the United States Court of Appeals for the Seventh Circuit in Knapp v. Whitaker, et al., 757 F.2d 827, (7th Cir. 1985).

OPINIONS BELOW

The district court's opinion and judgment (March 30, 1983) is unreported and is reprinted at A. 46. The district court's opinion on remand (December 5, 1983) is reported at 577 F.Supp. 1265 and reprinted at A. 58. The Court of Appeals' opinion is reported at 757 F.2d 827, and is reprinted at A. 1.

JURISDICTION

This is an appeal from a decision of the Court of Appeals for the Seventh Circuit which held that School Board Policy No. 2111.10(11)[1] violated the United States Constitution and the district court judgment which invalidated

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[1] Board Policy No. 2111.10(11) states:
"[The Superintendent shall] Communicate, or cause to be communicated, to all employees, all actions of the Board relating to the several employees, and all communications made to the Board shall be through him."

that policy both on its face and as applied. This Court has jurisdiction pursuant to 28 U.S.C. §1254(2).[2] The

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[2]The provision of a local school district's board policy might not in ordinary parlance be thought to be a "state statute." But the principles enunciated by this Court in defining the reach of its appellate jurisdiction indicate that the board policy in question does come within the ambit of 28 U.S.C. §1254(2).

"For the purposes of §1254(2), local ordinances are treated as state statutes." Doran v. Salem Inn, Inc., 422 U.S. 922, 927 n.2 (1975). A "legislative" enactment of a public school district, adopted pursuant to authority vested in the school district by state statute, constitutes a "state statute" for purposes of appellate jurisdiction, Illinois ex rel McCollum v. Board of Education, 333 U.S. 203, 206 (1948), and the provision of the board policy involved in this case is such an enactment. It has "continuing force and is intended to be observed and applied in the future," King Mfg. Co. v. City Council of Augusta, 277 U.S. 100, 104 (1928); is enforceable by judicial action; and was adopted pursuant to authority invested in the school district by Illinois state statutes [the Illinois School Code, Ch. 122, §§10-2, 10-20.5, 10-21.4, 33-1 and 33-4] and specifically and expressly invested in the Peoria School District by the special charter of the State of Illinois on February 20, 1869 (A. 93).

The provisions of the school board policy constitute a legislative enactment (and a "state

(Footnote Continued)

lower court's jurisdiction was founded on 28 U.S.C. §1331 and 28 U.S.C. §1291.

The court of appeals issued its opinion on March 5, 1985. A timely petition for rehearing was denied on April 2, 1985 (A. 44). This jurisdictional statement is filed within ninety days, and a timely notice of appeal was filed in the court of appeals on April 15, 1985 (A. 90), 28 U.S.C. 2101(c).

(Footnote Continued)
statute" within the meaning of §1254(2)) as they were promulgated unilaterally by the school district as one of its regulations. Indeed the provision is a portion of the model national school boards policy promulgated by the National School Boards Association.

While it is our belief that this appeal is appropriate under 28 U.S.C. §1254(2), we recognize that this Court may disagree. In such event, these papers will be "regarded and acted on as a petition for writ of certiorari,"28 U.S.C. §2103, and for the reasons stated herein a writ should issue.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following provisions of the Constitution of the United States are involved on this appeal:

> Amendment I. Congress shall make no law...abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
>
> * * *
>
> Amendment VII. In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Relevant provisions of Illinois State statutes are reprinted at A. 95.

STATEMENT OF THE CASE

Plaintiff, a school teacher and assistant baseball coach in the Peoria Public Schools, spoke to several individual board members in their homes or by telephone on topics including: (1) the suitability of the classroom assigned to him, (2) the use of contraceptives and films of live birth in his course content, (3) his reimbursement for mileage expense from the school's athletic fund at the rate of $.12 per mile, (4) the purported absence of adequate protection from liability claims afforded him by the school district,[3] (5) the negative content

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[3] Mr. Knapp apparently confused the requirement under Illinois State statute of the school district's duty to indemnify fully its (Footnote Continued)

of his personal evaluations as a teacher, and (6) the claimed ineffectiveness of the grievance procedure. On April 1, 1981, the superintendent of the school district met with plaintiff and orally reprimanded him pursuant to Board Policy 2111.10(11)

(Footnote Continued)
employees, administrators and teachers, and parents who transport students involved in extracurricular activities with the purchase from private companies of liability insurance to cover such liability claims. Either by ignorance or intent, plaintiff repeatedly represented that the district's purchase of $1,000,000 of liability insurance from private companies left himself, other employees and third party volunteers unprotected against liability claims even though state statute fully indemnifies, whether or not the district insures through a private company, against all such claims. Besides the statutory indemnification, Illinois school districts are given the taxing authority to fully fund such indemnification needs by refunding bonds. Ch. 122, Ill.Rev.Stat., §§19-8 and 19-15, et seq. The Court of Appeals also apparently confused the issue of a private insurance purchase with full protection of parents or teachers who transport (A. 26-7). Under Illinois statutes transporters are fully protected whether or not there is private insurance. There is no statutory duty to insure or to purchase insurance, only to indemnify. The question of protection is a non-issue except for plaintiff's disinformation campaign, as full protection is provided by statute.

for contacting board members in their homes or by telephone. The superintendent told plaintiff he was "not to talk to any board member about his personal employment relationships and to comply with the board policy." The Superintendent followed the oral warning with a written warning the following day. Plaintiff's April 29, 1981, evaluation similarly included a statement regarding compliance with the board policy, but expressly permitting contact on matters of general interest or public concern. In the spring of 1981 plaintiff missed a substantial part of the baseball season due to phlebitis, the onset of which was attributable to his coaching activities. Plaintiff later initiated a worker's compensation claim alleging that his phlebitis was work related. On June 15, 1981, the principal of the high school where plaintiff was employed telephoned plaintiff to inquire

about his health. Plaintiff told his principal that he still suffered from phlebitis and that he would not be able to participate in the summer baseball program. During this telephone conversation, the principal advised plaintiff that he, the principal, needed to make the decision and complete the extracurricular assignments for the coming year and that due to the uncertainty of plaintiff's prognosis and the potential need for surgery that he would not reassign him as assistant baseball coach[4] and would name a replacement.

In May of 1982, after this litigation had begun plaintiff was notified that he would be transferred from Woodruff High School because of declining enrollment and

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[4]The assistant baseball coaching position paid just under $1,400.00 per year and was non-tenured under Illinois law.

cutbacks in the science department. At that time plaintiff, a biology teacher, was the least senior of all teachers employed in the science department at Woodruff High School.

Plaintiff's claim against the school district, the superintendent and other administrators stated that he was removed from his part-time assistant baseball coaching job, denied a personal leave day with pay, given a reprimand which was placed in his file for not following board policy, and transferred to another school within the district, all in retaliation for the exercise of protected speech. The defendants maintained that plaintiff's speech was of personal interest only, was not protected, and denied that it was the reason for the decisions regarding his coaching job, the personal leave day with pay, or his transfer to another school. The defendants contended: (1) that

phlebitis and the uncertainty of his availability for the 1982 baseball season was the sole reason and the motivating reason for his replacement as assistant baseball coach; (2) the language of the board policy relating to personal leaves with pay was the sole and motivating reason for the denial of plaintiff's request for a paid leave; and (3) the lack of seniority in light of the declining enrollment at his school was the sole and motivating reason for his transfer.

The District Court's Decisions

On February 1, 1983, the trial court ruled that all of plaintiff's speech to individual board members, regardless of topic, was protected by the First Amendment. The jury was instructed that defendants violated plaintiff's constitutionally protected rights by placing any restrictions on his speech and that Board

Policy 2111.10(11) was invalid and unenforceable, having determined that it was unconstitutional both on its face and as applied to plaintiff (A. 56). On February 2, 1983, the jury returned a verdict in favor of the plaintiff and against the defendants in the amount of $514,333.00 for compensatory damages. On March 30, 1983, the trial court denied defendants' motion for judgment notwithstanding the verdict or motion for a new trial. A Notice of Appeal was filed on April 22, 1983, and the case was docketed in the Court of Appeals for the Seventh Circuit on April 27, 1983. The Court of Appeals for the Seventh Circuit remanded the case to the trial court "for reconsideration in light of the Supreme Court's decision in Connick v. Myers" on June 30, 1983. Upon reconsideration, the lower court denied defendants any relief and a second appeal was taken.

The Court of Appeals' Decision

On March 5, 1984, the Court of Appeals, although finding that two of the five topics of plaintiff's speech to board members dealt with matters solely of personal interest and not of public concern, affirmed the lower court decision that the defendants had violated plaintiff's First Amendment rights. The Seventh Circuit found that the school district had a legitimate interest in maintaining order by channeling a teacher's communication to the school board through the superintendent, which prevented the board from being overburdened with personal, job related issues more efficiently handled at the administrative level. Despite this finding, the Court in effect invalidated the board policy by affirming the lower court's decision that defendants infringed upon Knapp's constitutional right to free speech by imposing even

limited restrictions.[5] The Court of Appeals found that the jury verdict of $514,333,00 with a claim of "roughly $4,000.00" in financial loss was excessive, unreasonable and unsupported by the record and remanded the case to the district court. However, the Court of Appeals remanded with "instructions that the trial judge review the trial record, "assess the jurors' probable reaction" to the equitable relief, and recalculate the compensatory damage award to an amount between $200,000 and $400,000." (A. 38).

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[5]The Court of Appeals recognized that the reprimands and warnings were pursuant to a narrow interpretation of the board policy. It is noteworthy that there was no evidence that Board Policy 2111.10(11) was ever used to prevent the flow of communication or information. Indeed plaintiff testified the only time he attempted to comply with the policy, the information he sent to the superintendent had in fact been forwarded to all board members. There was and is no evidence of prohibition let alone prior restraint and by its own language the board policy does not permit prohibiting speech.

On remand the Court of Appeals further directed the district court to provide the parties with findings of fact on the issue of Knapp's certification to teach high school level science classes in the State of Illinois.[6]

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[6]On February 1, 1983, defendants received correspondence from the Office of the Regional Superintendent of Schools of Peoria County indicating plaintiff although "certified" to teach high school was not "qualified" to teach biology or any other high school level science course in the State of Illinois. [As to the distinction see: Lenard v. Board of Education, 74 Ill.2d 260, 384 N.E.2d 1321 (Ill.Sup.Ct. 1979).] That letter was submitted to the district court, however, defendants did not attempt to utilize it as an explanation for their decision relating to plaintiff's transfer to the grade school because the information arose following the decision to transfer which was based solely on seniority. The defendants did, however, request the district court grant an evidentiary hearing prior to considering equitable relief because on March 23, 1983, they received a letter from William Helton, Assistant Manager for the Illinois State Board of Education, also stating that plaintiff was not qualified to teach science at the high school level. That request to the district court for an evidentiary hearing was by letter dated March 24, 1983. The Court denied the request for a hearing.

Although plaintiff has attended college

(Footnote Continued)

The question of the validity, constitutionality and enforceability of Board Policy 2111.10(11) was raised initially in pre-trial motions in the district court but not decided. The district court later determined that the policy was unconstitutional both on its face and as applied, and accordingly instructed the jury and permitted argument of counsel in closing to be guided by that ruling (A. 56). No

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(Footnote Continued)
classes since 1983, the latest correspondence from the Office of the Illinois State Board of Education dated April 4, 1985, indicates plaintiff is still not qualified to teach science at the high school level. Because this issue has, we contend, been satisfactorily resolved by the Court of Appeals' remand to the district court for an evidentiary hearing and finding of facts on the issue of Knapp's qualifications to teach high school level science courses in the State of Illinois it is not the subject of this appeal. The subsidiary question of the effect of Knapp's becoming qualified through his course of studies between 1981 and 1985 vis-a-vis his lack of qualifications in 1982 when the transfer decision was made and 1983 when the trial court's equitable relief order was granted and the March 1985 Court of Appeals decision was made, will of course be presented to the district court on that remand.

defendants' verdict form was tendered to the jury. On appeal the Appellate Court reviewed this determination both as it pertained to the First Amendment protected speech issue (A. 8; 29-31) and as to the correctness of the jury instruction (A. 17, 35).

The Mt. Healthy questions were raised in pre-trial motions, during the jury instruction conferences, and in the post-trial motion. Defendants raised the issue before the Appellate Court in the principal appeal.

The defendants raised the excessive verdict issue by post-trial motion in the trial court. The issue was raised in all briefs filed with the Court of Appeals and although the Court of Appeals found the verdict excessive and unreasonable, it remanded with the directions to the trial judge to recompute the verdict based on his assessment of the jurors' probable

view of the fact issue. A petition for rehearing was denied.

THE QUESTIONS ARE SUBSTANTIAL

The questions presented by this appeal are substantial and warrant the attention of this Court for the following reasons: (1) the position taken by the district court and the Court of Appeals as to plaintiff's First Amendment rights and Board Policy 2111.10(11) is in direct conflict with the decision of this Court in Connick v. Myers, 461 U.S. 138 (1983); (2) public employers are regularly confronted with employees' personal grievances (as distinct from "whistle blowing" or statements designed to alert the public to potential wrongdoing) and the lower court decisions undercut this Court's distinction between the two; (3) the Court of Appeals' analysis and application of the decision in Connick v. Myers to the

school board policy is internally inconsistent and at odds with the District Court decision which it affirms; (4) the evidence of legitimate reasons for the actions taken with regard to plaintiff was unrebutted and not shown to be pretextual; and (5) the Court of Appeals' remandment to the trial judge of the compensatory damage award for "conjecture and recalculation" violates the parties' Seventh Amendment rights.

A. The Connick Questions

1. The Discrepancy in Lower Court Decisions Regarding Plaintiff's Speech.

The trial court ruled that school district employees have the right under the First Amendment to talk to school board members about any subject related to education or their employment. The trial court ruled Board Policy 2111.10(11) (directing that communications to board members be made through the office of the

superintendent) unenforceable in all instances (A. 56). Knapp contacted school board members concerning his classroom assignment, the content of his evaluations, the mileage allowance for coaches, the liability insurance program for coaches and volunteer parents who transport student athletes, and the general effectiveness of the school district's grievance procedure.[7] The Court of Appeals held that Knapp's complaints about classroom assignments and the content of his evaluations are clearly personal matters relating solely to his employment at Woodruff High School and are not protected speech (A. 24-5).

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[7]The grievance procedure was developed through collective bargaining with teachers' representatives. A board member's or administrator's speech to plaintiff (who is not the exclusive bargaining representative) could result, in the event it is about more than a mere personal/individual grievance of plaintiff, in an

(Footnote Continued)

On the "initial inquiry" as to whether the speech is a matter of public concern (which is an inquiry of law not fact), the Court of Appeals expressly overturned the trial judge's decision as to classroom assignments and the evaluations' content (A. 24-5). Unlike Connick v. Myers, 461 U.S. 138 (1983), however, the Court did not reverse. It affirmed the trial court's judgment for plaintiff. While it need not have entered judgment for defendants as this Court did in Connick [103 S.Ct. at 1694], the determination here that the trial court "got off on the wrong foot in this case by initially finding that" all of the speech was protected [103 S.Ct. at 1687] required remandment for a new trial of the factual

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(Footnote Continued)
unfair labor practice complaint against the district, board member or administrator. Ch. 48, §§1703 and 1714, Ill.Rev.Stat. (1984).

issues. [See point "B" below]. Had it done so, or should this Court reverse and remand for a retrial on this basis, the constitutional question could have been avoided.

2. The Court of Appeals Erred In Finding Plaintiff's Speech Was Protected.

The Court of Appeals determined that two of the five topics plaintiff spoke to board members about were personal and not protected. But we contend that its determination that the other topics, e.g. mileage reimbursement, liability protection, and the effectiveness of the grievance procedure were matters of public concern and thus protected was also erroneous. The Appellate Court took personal comments of Knapp, twisted them into a general context by their characterization and concluded they were matters of public concern. If that approach is proper, literally any employee speech is

on a matter of public concern and the Connick ruling is meaningless.

On mileage reimbursement, Knapp requested $.20 per mile reimbursement and the principal awarded only $.12 explaining that the athletic fund[8] was insufficient to pay any more. The testimony was that many of plaintiff's coaching colleagues did not even request mileage reimbursement for that very reason. Plaintiff then took his personal gripe about not being reimbursed for $.20 directly to individual board members. This contact preceded any filing of a grievance by plaintiff. He never claimed that the school district contribution of $10,000 to each athletic fund was too little or too much. He never claimed that the money was being spent

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[8]The athletic fund at each high school is made up of $10,000 of public funds from the school district and supplemented by ticket sales, car washes, booster club activities, concessions, etc.

foolishly or for illicit purposes. He never claimed any money was unaccounted for nor did he request an accounting. His only claim was that his request was not granted for $.20 but only for $.12 per mile. He characterized this as inequitable because his travel as a teacher was reimbursed by the school district itself at $.20 per mile. The athletic fund from which coaches are reimbursed for mileage was insufficient to pay more than $.12.

The Court of Appeals states this was a matter of public concern for two reasons: first, because it involved "not only Knapp but all coaches at Woodruff who travel to any high schools" and "Knapp protested on behalf of all coaches" (A. 25); and second, because the complaint was "the inequitable allocation of public funds to a select group of Peoria area high school coaches" and "was an attempt

to inform the public and the educational policy makers of Peoria that officials in District 150 were failing in their duty to properly administer the allocation of public funds."

Plaintiff's complaint was that he wasn't reimbursed at $.20 per mile. After he talked to individual board members he filed a grievance "on behalf of all coaches." But no other coaches filed a grievance or joined in Mr. Knapp's grievance. Many coaches did not even seek reimbursement, let alone inquire or complain about the rate of reimbursement. Plaintiff's effort to speak on behalf of others was nothing more than Sheila Myers' claim in Connick that she spoke on behalf of other employees. Her survey was designed to inquire into and encourage support for her position amongst fellow assistants. Certainly more is necessary to characterize a matter of public concern

than simply an individual, for purposes of his personal gripe, claiming that he speaks for a broader class of individuals, particularly when they do not participate or promote his role as spokesman.

There was no "inequitable allocation" of public funds since the school district gave each high school athletic fund $10,000 apiece. It was the private fund raising at each school that varied and the demands on each high school's athletic fund varied by the mileage their coaches drove and the number of requests their coaches made. Contrary to the Court of Appeals' statement, there was never a claim that those funds were not properly administered, or accounted for, or allocated. Indeed it is axiomatic that no more could be paid out from the fund than was taken in. And that's all that the evidence below reflected.

The liability protection issue, because it was a false issue, was not protected speech. Plaintiff told others that they were unprotected from liability exposure. But Illinois statute specifically provides full protection by means of indemnification by the school district for such transporters. Ch. 122, §§10-20.20 and 10-22.34(a), Ill.Rev.Stat.

The trial court held that the "liability insurance issue cited by Mr. Knapp affected not only Mr. Knapp but all the teachers in the district and the students and their parents as well." The Court of Appeals indicated that it was a matter of interest and concern to members of the Peoria community and that "in today's litigious society, a volunteer who gratuitously donates time and expense in transporting students is entitled to know the risks involved and the limits of liability

insurance coverage in the event of an unfortunate accident."

What the lower courts failed to comprehend is that there is now and always has been complete protection against claims through the indemnification provisions of statute. The school board's decision to purchase insurance or to self-insure does not materially affect the liability protection afforded coaches and parents. In that respect there is no risk involved for transporters. It is true that as a result of plaintiff's disinformation campaign concerning liability insurance and the protection afforded teachers and parents that teachers and parents became alarmed. Though plaintiff chose to stir up the issue of liability insurance and protection, he failed to explain to his colleagues or parents of students in the baseball program that the school district and Illinois state statute

fully protected them against any claims of liability for the transportation of students. Defendants contend that because plaintiff spread disinformation to parents and coaches, it is in effect exactly like the unprotected, false speech spoken of by this Court in Pickering v. Bd. of Ed., 391 U.S. 563 (1968).

Finally, the Court held that the effectiveness and proper operation of the grievance procedure is a matter of public concern. Illinois school districts were not legally required to provide a grievance procedure and teachers had no entitlement to it. The establishment of a grievance procedure, whether by unilateral action or collective bargaining, was a benefit provided to the teachers at the discretion of the public employer and a condition of employment. In Connick one of Sheila Myers' concerns was the non-existent grievance procedure. And

included in her questionnaire was an inquiry thereon. This Court did not find that to be a matter of public concern. The testimony established that all of plaintiff's criticism of the grievance procedure was in the context of how such procedure failed to provide him with the result he expected from his own grievances. This Court in Connick made it plain that "an individual cannot bootstrap his individual grievance into a matter of public concern...by invoking a supposed popular interest in all aspects of the way public institutions are run." Renfroe v. Kirkpatrick, 549 F.Supp. 1368 (N.D.Ala. 1982) aff'd 722 F.2d 714 (CA 11, 1984); Mahaffey v. Kansas Board of Regents, et al., 562 F.Supp. 887, 890 (D.Kan. 1983).

3. School Board Policy 2111.10(11) Is A Valid Time, Place And Manner, Content-Neutral Restriction.

School Board Policy 2111.10(11) states:

> "11. Communicate, or cause to be communicated to all employees, all actions of the Board relating to the several employees, and all communications made to the Board shall be through him (the School Superintendent)."

Policy 2111.10(11) does not prohibit communication, nor does it empower or direct the superintendent to pre-approve or withhold any communication. Instead, it channels all communications through him, not unlike any "chain of command." See: Boyd v. Secretary of the Navy, 709 F.2d 684, 687 (CA 11, 1983); English v. Powell, 592 F.2d 727, 732 (CA 4, 1979); Humphrey v. Highland Park Ind. Sch. Dist., 361 F.Supp. 451, 453 (N.D.Tex. 1973). The Peoria School District has over 2,300 employees, and it is not unreasonable to

utilize a chain of command for all communications, public or private. It was drawn from the model national school policy promulgated by the National School Boards Association, and is consistent with, if not mandated by, Illinois State regulations which specify: "The board of education shall carry out all professional and official relationships with school employees through the district superintendent." §2-2.3, Illinois State Board of Education Document Number 1, "The Illinois Program for Evaluation, Supervision, and Registration of Schools (October 1, 1977), p. 6.

Policy 2111.10(11) includes "all communications." It specifies no preference for the content of the communication or even the general subject matter which might imply a content-based regulation. This Court has ruled that if there is a rational basis for a content-neutral

restriction on the time, place or manner of speech, it is constitutionally valid. Kovacs v. Cooper, 336 U.S. 77 (1949). The Court of Appeals found there were "legitimate interests" for the policy. (A. 29.) Therefore, it was error for the court to hold that the content-neutral policy which restricts only the time, place or manner of unprotected speech is illegal.

In Healy v. James, 408 U.S. 169 (1972), the Court stated:

> "Just as in the community at large, reasonable regulations with respect to the time, the place and the manner in which student groups conduct their speech-related activities must be respected. A college administration may impose a requirement, such as may have been imposed in this case, that a group seeking official recognition affirm in advance its willingness to adhere to reasonable campus law. Such a requirement does not impose an impermissible condition on the students' associational rights. Their freedom to speak out, to assemble, or to petition for changes in school rules is in no sense infringed. It merely constitutes an agreement to

> conform with reasonable standards respecting conduct. This is a minimal requirement, in the interest of the entire academic community, of any group seeking the privilege of official recognition." 408 U.S. at 2352

See also: Heffron v. Intern. Soc. for Krishna Consciousness, 452 U.S. 640 (1981), and Frumer v. Cheltenham Tp., 545 F.Supp. 1292 (E.D.Pa. 1982).

The Court of Appeals in Perry Local Educators' Assn. v. Hohlt, 652 F.2d 1286 (CA 7, 1981), rev'd, 460 U.S. 37 (1983), distinguished content-based and content-neutral restrictions. A school board is able to place restrictions on who may use the internal mail system or the content of messages that pass through it. Content-based restrictions would, of course, be subject to a strict scrutiny; but reasonable time, place and manner restrictions would be validated if they had a rational basis. The internal mail system required that deliveries to staff be deposited with

the principal's secretary and, in that respect, is not unlike Policy 2111.10(11), which channels communication to the board through the superintendent. [Cf. Federation of Delaware Teachers v. De La Warr Bd. of Ed., 335 F.Supp. 385 (D.Del. 1971); Connecticut S. Federation of Teachers v. Bd. of Ed. Members, 538 F.2d 471 (CA 2, 1976).] This Court's decision in Perry Education Assn. v. Perry Local Education Assn., 460 U.S. 37 (1983), reversed the Court of Appeals' decision, but that reversing opinion confirms that the School Board's policy here meets and exceeds constitutional muster.

In Fujishima v. Board of Education, 460 F.2d 1355 (CA 7, 1972), the Court reviewed a prior submission/prior approval policy on the distribution of literature on school premises, but specifically noted that its injunction did not prevent the school from "promulgating reasonable,

specific regulations setting forth the time, manner and place in which distribution of written materials may occur." [460 F.2d at 1359].

In Key v. Rutherford, 645 F.2d 880 (CA 10, 1981), a police chief had been discharged for insubordination because he violated a regulation that provided that "employees are not to discuss complaints or problems with City Council members. To do so is considered grounds for dismissal." [645 F.2d at 882.] The trial court considered Section 4.11 unconstitutional on its face, but the Court of Appeals reversed holding that the regulation had to be evaluated under the Pickering balancing test. The plaintiff in Key had directed his comments to the mayor personally rather than to or through the public. The prohibition was simply as to that direct contact.

The School Board Policy here does not on its face confer to the superintendent the right to exercise any discretion as to which communications shall or shall not be passed on to the board. He serves only as a conduit.[9] There is no evidence in this record that the superintendent ever refused to forward employee communications directed to the board.[10]

When confronted with plaintiff's persistence in contacting board members at their homes about his personal gripes, the

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[9]Such policy has the salutory administrative effect of permitting the superintendent to investigate the matter and provide any further information to the Board that is appropriate. As in the case of liability protection, to provide the true information to the Board that full protection exists through indemnification provided by Illinois statute not by administration or Board choice.

[10]In fact, plaintiff was asked at trial whether he had channeled communications to the board through the office of the superintendent. He testified that he did on one occasion and that the material was, as he requested, given to the board members. [Tr. Vol. 2, p. 121]

administration responded by placing an admonition in his April 29, 1981, evaluation:

> "On several occasions he has contacted school board members concerning personal employment problems. Problems of this nature are to be discussed with the building principal or, as stated in Board Policy 2111.10, through the office of the superintendent. Mr. Knapp is to refrain from contacting board members or speaking at public meetings concerning his personal employment relationships.
>
> He is, however, allowed to contact board members about matters of general public interest. His insistence on airing personal problems directly with the board is disruptive and will not be tolerated."

The statement placed in plaintiff's evaluation is not "an attempt to silence Mr. Knapp," as suggested by the trial judge. To the contrary, Policy 2111.10(11) is cited only with respect to following the chain of command and was never used to silence plaintiff [see notes 5 and 10]. Anderson v. Evans, 660 F.2d

153 (CA 6, 1981); Barbre v. Garland Independent School Dist., 474 F.Supp. 687 (N.D.Tex. 1979); Riechert v. Draud, 511 F.Supp. 679 (E.D.Ky. 1981); Roseboro v. Fayetteville City Bd. of Ed., 491 F.Supp. 113 (E.D.Tenn. 1978); c.f. Columbus Education Association .v. Columbus School District, 623 F.2d 1155 (CA 6, 1980).

For the reasons stated, Board Policy 2111.10(11) was a valid time, place or manner, content-neutral restriction and such policy was neither unconstitutional on its face nor unconstitutionally applied to plaintiff.

B. The Mt. Healthy Questions

1. The District Court's Holding and Jury Instruction That All Speech was Protected Constituted Error.

If Knapp's unprotected speech was the causal link, he could have been reprimanded, terminated as a coach, denied

a personal leave day and transferred to an elementary school solely because he chose to take his personal complaints to school board members instead of following board policy. Connick v. Myers, 462 U.S. 138 (1983), Mt. Healthy City Board of Ed. v. Doyle, 429 U.S. 274 (1977).

Since the Court of Appeals held that some of Knapp's speech was not protected, there is a question of fact as to whether penalties were imposed on Knapp for his protected or unprotected speech. But because of the trial court's decision that all speech was protected, the jury was denied the opportunity to consider this question.

At the close of all evidence, the District Court ruled whether and to what extent Knapp's speech was protected. Judge Mihm stated that all of "the speech involved in this case...is protected speech" under the First Amendment and

instructed the jury that all reprimands violated Terry Knapp's rights (A. 17-8). This instruction was in error and deprived defendants of a fair determination of the question as to whether penalties were imposed on Knapp for his protected speech as distinct from unprotected speech.

The impact of the trial judge's instruction was to preclude any possibility of a defendants' verdict form. The judge ruled that all speech to board members was protected, that Knapp's rights were violated, and that Knapp was, therefore, entitled to compensatory relief as a matter of law. Under this Court's rationale, Knapp is only entitled to relief if the jury finds that the reprimands and other actions taken against him were motivated because he exercised his "protected" speech. Defendants were prohibited by the trial court's ruling from arguing to the jury that they had the

right to reprimand, terminate his coaching or transfer plaintiff if such action were taken because he chose to air his personal grievances directly with the board instead of following board policy.

Since Knapp's personal complaints about his classroom and evaluations were not protected speech, the school district should not be barred from reprimanding Knapp for discussing such subjects with school board members. The language of the formal reprimand closely parallels the holdings in Pickering and Connick. Simply stated, Knapp was informed that he was not to air personal problems directly with the board, but that he was allowed to contact board members about matters of general public interest.

In Mt. Healthy City Board of Ed. v. Doyle, 429 U.S. 274 (1977), this Court stated:

> "A rule of causation which focuses solely on whether

> protected conduct played a part, 'substantial' or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. 97 S.Ct. 575.

Plaintiff was placed "in a better position" by using some protected speech. The jury might well have come to a different conclusion if it had been told that some of Knapp's speech was not protected, as the Court of Appeals later determined. The District Court's ruling that all speech was protected vitiated any possibility of a fair and impartial verdict on the factual issues because:

a. The jury was instructed that plaintiff's rights were violated.

b. There was no defense verdict form.

c. The jury was deprived of an opportunity to decide whether the

actions taken against Knapp were the result of speech or conduct that the Court of Appeals determined was not constitutionally protected.

2. The Lower Courts Failed to Follow The Mt. Healthy Doctrine.

This Court's decision in Mt. Healthy City Sch. Dist. v. Doyle, 429 U.S. 274 (1977), provides the ruling precedent in mixed-motive cases. The rulings below fail to follow this precedent. The entire trial was conducted pursuant to rulings that all of plaintiff's speech was protected, so there was no defendants' verdict form and no opportunity to distinguish protected from unprotected speech. The Court of Appeals affirmed the liability verdict rather than remanding for a new trial so that the protected speech could be divided from the unprotected. In light of Instruction No. 10, the jury did not have the opportunity to

fairly appraise the case.[11] Because of trial errors, the Mt. Healthy questions were not fairly presented.

An even more important question regarding the Mt. Healthy doctrine is presented here because the Court of Appeals recognized that this record contained sufficient evidence to support the conclusions that (1) Knapp received negative evaluations because the evaluator "observed a pattern of attitude problems";

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[11]The Court of Appeals' statement that because the district court had ruled plaintiff's speech was protected it was required to inform the jury is not disputed. What is disputed is the method chosen versus the correct method. Here the trial court chose value-laden language "plaintiff's constitutionality protected speech" which was also so generalized as to be unhelpful in differentiating with hindsight. Had the Court not invaded the jury's fact finding role and asked the question in terms of plaintiff's speech (e.g. was plaintiff's speech on classroom assignment a motivating reason...) then it could be stated whether or not liability attached when the Court of Appeals reversed on that speech as being personal and unprotected. That was not done here and it is irreparable error requiring a new trial.

(2) the principal removed him as coach due to his phlebitis; (3) Knapp was transferred because he lacked seniority; and (4) he was denied a day off with pay to see a lawyer because he failed to present any compelling reason as required by board policy (A. 32). Even though the trial rulings on what was protected speech were erroneous, the Court of Appeals stated that the jury determination should be upheld. The jury's determination of credibility and the weighing of evidence cannot be so easily segregated from erroneous procedural rulings, instructions, interrogatories, and argument of counsel. If they can, Mt. Healthy's three part procedure is rendered meaningless. Moreover, unless a plaintiff is held to some rebutting requirement of legitimate, substantial, non-discriminatory reasons proved by a preponderance of the evidence as defendants did here and as the Court of

Appeals recognized, then Mt. Healthy addresses mere form and not substance. Defendants did not concoct plaintiff's phlebitis and the likelihood in June of 1981 of the need for surgery and his unavailability for baseball. It was true.

It has been suggested that plaintiff bears a burden of persuasion and proof that the articulated reasons for the governmental actions (shown by a preponderance of the evidence) are in fact pretextual. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255-6 (1981); Nekolny v. Painter, 653 F.2d 1164, 1173 (CA 7, 1981). Here there was no rebuttal showing whatsoever by plaintiff that the phlebitis, declining enrollment/seniority, etc. were pretextual, concocted, or nonexistent. In fact, they were admitted by the plaintiff. For Mt. Healthy to mean anything under circumstances like these, it must mean that

plaintiff failed to meet his burden to rebut the legitimate, independent reasons for the defendants' actions.

C. The Remand/Remittitur Questions

The Court of Appeals decided that the jury's compensatory award of $514,333,[12] in light of Knapp's "roughly $4,000" in financial loss, was excessive because the jury did not have the opportunity to consider the effect of the equitable relief ordered by the trial court (i.e.

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[12]The record establishes that the "illness" or "emotional injury" sustained by Knapp occurred after he was given the April 29th evaluation. Defendants contend that since they had a right to reprimand for taking personal grievances directly to the Board, such injury was not compensable. Although defendants argued that the size of the verdict itself, over 110 times the amount of special damages, when compared to all other civil rights or free speech awards which have been made, [it is ten times greater than the largest prior free speech teacher (discharge or not) case found by counsel or the lower courts], "shocks the conscience" and is "monstrous" [Appellants' Court of Appeals Br. pp. 44-7; Rep. Br. pp. 35-42], the Court of Appeals made no mention of that comparative analysis argument in its decision.

expunging all documents in personnel files, reassigning him as a science teacher, and reinstating him as an assistant baseball coach at Woodruff) (A. 37). The Court of Appeals remanded the case "to the district court with instructions that the trial judge review the trial record, 'assess the jurors' probable reaction' to the equitable relief, and recalculate the compensatory damage award to an amount between $200,000 and $400,000." (A. 38). Only two cases are cited by the Court of Appeals for this novel remand and neither involve a remand with comparable instructions: U. S. v. Bruscino, 687 F.2d 938 (CA 7, 1982), and Abernathy v. Superior Hardwoods, 704 F.2d 963 (CA 7, 1983).

In Bruscino, the Court sitting in banc in a criminal case determined that the impact of two items found in the jurors' room (which were not in evidence) was best left to the determination of the

trial judge. That "inquiry into prejudice [becomes] a matter of assessing the probabilities that a particular jury was prejudiced by particular documents." [687 F.2d at 941]. The Court stated that the trial judge, with his opportunity to observe the jurors' demeanor and gauge their attentiveness and the atmosphere of the trial was in a better position than the appellate court to make the determination. Bruscino presented the sole question whether there was prejudice in the jury's deliberation.

In Abernathy, the Court remanded for a new trial limited to damages unless the plaintiffs accepted a remittitur of the judgment. It is a classic remittitur opinion in the sense that it elaborately sets out the computation and analysis of the excessive portion of the award. The Court arrived at the total amount "which could have been made consistently with the

evidence, the instructions and the closing argument of the plaintiffs' counsel" by calculating the stipulated medical expenses and discounting to present value the award for pain and suffering. [704 F.2d at 973-4].

Although Abernathy is directed to the substance of the judgment, and required some speculation on the part of the Court (i.e. as to "per diem" and the discount rate) there was a basis in the evidence and the plaintiffs' argument for making the computations required. Here there is no basis. The jury's award of $514,333 is not reflective of any parameters in the evidence, counsels' remarks, the elements of damage allowable, the instructions, or the verdict forms. It is as if the

figures were drawn from the proverbial "thin air."[13]

There are cases where the Courts of Appeal have remanded to the trial court for computing and fixing a remittitur, because the trial court saw the witnesses and heard their testimony [e.g. Natco Inc. v. Williams Bros. Engineering Co., 489 F.2d 639 (CA 5, 1974)]; but they do not support the proposition that the court can invade the province of the jury in recalculating unliquidated damage amounts without some basis in the evidence, argument or instructions. Our concern is not with the aspect of the remandment to the trial judge to make the determination,

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[13]Or "out of a hat" as a different panel of the Court of Appeals stated in Taliferro v. Angle, 757 F.2d 157, 162 (CA 7, 1985). That court pointed out that "general damages are not available in civil rights tort cases" and that "a plaintiff is not permitted to throw himself on the generosity of the jury." But that is precisely what the panel decision below permitted.

but with the absence of any standard in this record by which the decision can be fairly made.

The circumstances of this case and the instructions of the remandment call into question the defendants' rights to a fair and impartial jury determination of the matter.[14] The Court of Appeals' direction is for the trial judge to "assess the jurors' probable reaction to the equitable relief and recalculate the compensatory damage award." (A. 38). That direction ignores the parties' rights to a jury trial.[15]

In the classic remittitur example, the court is simply excising the excess amount from the jury's award and

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[14]The full text of the Seventh Amendment is found at p. 5 infra.

[15]The right is to trial by jury; not trial by a judge who has been told to think like a jury.

permitting the rest to stand (with the parties assent).[16] In the case of unliquidated damages, remittitur has been said to be "on its shakiest constitutional basis." 43 U. Chi. L.Rev. 376, 385 (1975-6). The power for a remittitur has always been limited and suspect in cases where the amount remitted is not a certain, identifiable sum, which is included in the verdict but should not have been. In this case the verdict cannot be differentiated by the evidence, elements of damage allowable, or even the argument of counsel. A retrial on damages is the only available alternative to pure speculation or conjecture on the jury's determination.

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[16]Were it not for the more than 100 year history of remittitur in American law, this logic, which itself has been severely criticized, would probably not be sufficient to meet Seventh Amendment attacks. Dimick v. Schiedt, 293 U.S.

(Footnote Continued)

A jury determination of damages is the essence of the right to trial by jury. It is consistent with the Seventh Amendment to allow the judiciary to correct jury verdicts that fly in the face of undisputed facts or fail to consider undisputed facts; it is not consistent to direct a judge to guess at what a jury might have done had it been presented with different instructions. 43 U. Chi. L.Rev. 376, 390 (1975-6). The instruction for the remand simply invites speculation and conjecture as to what the jury would have decided had it known of the equitable relief. It poses a difficult task, if not an impossible one, for the trial judge. Even if it is not in violation of the Seventh Amendment it sets a troublesome

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(Footnote Continued)
474, (1935), and 11 Wright and Miller, Federal Practice and Procedure, §2815.

precedent and represents a clear departure from established remittitur practice.

The Court in New York, C. & St. L. R. Co. v. Niebel, 214 F.2d 952 (CA 6, 1914) stated the problem best:

> "We recognize the desirability of the shortening of litigation and lessening of expense which such a remittitur may accomplish. However, in the instances in which this [remittitur] practice has been followed by the Supreme Court and by this court, there has been mathematical basis by which it could be computed, or at least closely approximated, how much of the verdict was due to the erroneous element; and we have declined to permit such a remittitur in a case where this computation could not be made; and we are not aware of any instance where this practice has been adopted by a federal appellate court, and in which the elements of damage were of such indeterminate character that there was no criterion for segregation." [bracketed material added; parentheticals omitted; 214 F.2d at 957-8].

The Court of Appeals' likely motivation in remanding with instruction, i.e to salvage the jury verdict below, to lessen expense

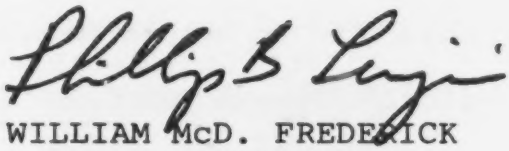
of more litigation, to shorten that litigation and to give plaintiff the benefit of a substantial part of that verdict (albeit decidedly excessive) is a worthy and understandable one. But on this record no mathematical basis or even close approximation is possible. The "Solomonic" decision which the trial court is directed to make on remand simply cannot be made. The constitutional question could have been avoided had the Court granted the rehearing petition and remanded for a new trial even if it was limited solely to the issue of damages.

CONCLUSION

For the reasons set forth above, this Court should note probable jurisdiction of this appeal. In the event this Court determines that there is no jurisdiction under 28 U.S.C. §1254(2), a writ of

certiorari should issue to consider the important questions and constitutional precedents presented here by the decisions below.

Respectfully submitted,



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May 18, 1985

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 84-1032 & 84-1060

TERRY C. KNAPP,

Plaintiff-Appellee,
Cross-Appellant,

v.

HARRY WHITAKER, RUSSELL MCDAVID, JOHN HATTON, PEORIA SCHOOL DISTRICT NO. 150, a body politic and corporate, and GEORGE BURDETTE,

Defendants-Appellants,
Cross-Appellees.

Appeal from the United States District Court for the Central District of Illinois, Peoria Division.
No. 81 C 1185—**Michael M. Mihm**, *Judge.*

ARGUED SEPTEMBER 21, 1984—DECIDED MARCH 5, 1985

Before COFFEY and FLAUM, *Circuit Judges* and CAMPBELL, *Senior District Judge.**

COFFEY, *Circuit Judge.* The defendants-appellants, Peoria School District No. 150, *et al.*, appeal the jury's finding that employees of the School District infringed upon Terry Knapp's First Amendment right to speak on matters of public concern, in violation of 42 U.S.C. § 1983. The jury awarded Knapp $514,333 in compensatory damages. On cross-appeal, Knapp appeals the district court's

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* The Honorable William J. Campbell, Senior District Judge of the United States District Court for the Northern District of Illinois, is sitting by designation.

denial of his motion to include a claim for punitive damages. We affirm the jury's finding that the Peoria School District infringed upon Knapp's constitutional right to free speech and we affirm the denial of Knapp's punitive damage claim, but we remand this case to the district court with instructions to reduce the excessive compensatory damage award to an amount between $200,000 and $400,000. We further direct the district court, on remand, to provide the parties with findings of fact on the issue of Knapp's certification to teach high school level science courses in the State of Illinois.

I

The record reveals that in September 1977, Russell McDavid, the principal of Woodruff High School in Peoria, Illinois, hired the plaintiff, Terry Knapp, to teach biology in the science department at Woodruff and also serve as an assistant basketball coach and an assistant baseball coach.[1] According to the administrative procedures at Woodruff High School, a newly hired teacher receives two written evaluations each academic year and upon the completion of two full years of acceptable performance, the teacher is

[1] The defendants' brief on appeal contains a portion of a letter, dated March 23, 1983, from William Helton, Assistant Manager for the Illinois State Board of Education, stating that:

> "Based upon the transcripts presented for Mr. Terry Carl Knapp, he is not qualified to teach science or health education at the high school level. Qualifications for science have remained the same since 1971 which was prior to his original employment within Peoria School District 150."

The defendants claim that they presented this letter to the district court on March 24, 1983, some six days before the court granted equitable relief and reassigned Terry Knapp to his position as biology teacher at Woodruff High School. Upon review of the district court record, we are unable to locate a copy of the complete letter, any reference to the letter by the district court, or any evidence in support of the defendants' claim.

placed on tenured status. During the relevant time period, September 1977 to July 1982, the teacher evaluations at Woodruff High School were performed by the school's administrative assistant, John Hatton. On November 14, 1977, Hatton conducted his first evaluation of Knapp and stated, *inter alia*, that "Mr. Knapp has done a good job thus far in both the classroom and with his extracurricular assignments." On March 21, 1978, Hatton performed a second evaluation and wrote that "Mr. Knapp continues to do a good job as a teacher and coach at Woodruff. . . . Hopefully he will continue to perform at his current high level and maintain his cooperative attitude." The following academic year, on January 11, 1979, Hatton again evaluated Knapp, stating that "[i]n summary Mr. Knapp is a good teacher and coach. It is hoped that he will continue to make a contribution to our youth." On March 30, 1979, Hatton evaluated Knapp for the fourth time and wrote, "Mr. Knapp continues to do a good job. He is a very good classroom teacher whose knowledge, presentation and general enthusiastic attitude insures a high degree of learning for his students." Hatton added that "Mr. Knapp is very enthusiastic and intense in both his teaching and his coaching. He does have, however, a tendency at times to be too opinionated and outspoken." At the close of the 1978-79 academic year, Knapp was placed on tenured status in accord with the administrative policy at Woodruff High School.[2]

In March of the 1979-80 academic year, Knapp resigned his position as assistant basketball coach due to disagreements with the head coach and increasing family obligations. At the same time, March 1980, Knapp submitted a reimbursement request to the Woodruff athletic director for the 400 to 500 miles he logged while traveling to area high schools to scout opposing teams and while transporting players to and from basketball games in his

[2] The record reveals that in Peoria School District 150, a tenured teacher receives a continuous contract that remains in effect until the teacher resigns or is removed from his position.

own automobile. Knapp requested a reimbursement of 20¢ per mile but was informed by the Woodruff athletic director that he would receive only 12¢ a mile. Knapp complained that this policy was unfair, especially in view of evidence that teachers at all schools in District 150, including Woodruff, and coaches at other Peoria public schools received a mileage allowance of 20¢ per mile. The Woodruff principal, Russell McDavid, explained that teachers who used their own vehicles to attend educational seminars and to transport students for educational purposes (i.e. field trips) were reimbursed directly by School District 150 at the uniform rate of 20¢ per mile. McDavid added that coaches were not reimbursed for their school-related travel expenses by the School District, instead each coach received a mileage allowance drawn from the athletic budget of his particular school. The Woodruff athletic budget consisted of $10,000 in public funds from School District 150, athletic booster club donations, fundraising proceeds, and gate receipts from the various Woodruff sporting events. According to McDavid, he independently decided upon the 12¢ per mile travel reimbursement figure when the comptroller of District 150 informed him, in the fall of 1979, of the possibility that Woodruff's $10,000 in public funds may not be forthcoming for the 1979-80 academic year. Knapp claims that he attempted to grieve this mileage allowance issue as an "unfair labor practice" but that his union representative was told by George Burdette, assistant superintendent of the Peoria School District, the claim was not grievable. In any event, Knapp did not file a formal grievance on the mileage allowance issue during the 1979-80 academic year.

Later in the spring of the 1979-80 school year, Knapp approached administrative assistant Hatton and inquired as to why he had not, to date, received an evaluation and why his schedule for the following academic year was not yet complete. Hatton responded that there were "inconsistencies in the figures we have gotten back from data processing" that accounted for the delay in compiling the schedule and also for the interrupted evaluation process.

According to Hatton, when he informed Knapp of the reason, Knapp "started screaming . . . 'You're trying to screw me.' 'I'm getting hosed.' 'You're trying to transfer me.' 'My evaluation is not done.' 'You're not man enough to get this done.' " The following day, Knapp contacted Hatton and apologized for his behavior. Hatton responded that he was "willing to forget the thing" and thus in an evaluation on May 27, 1980, Hatton simply stated that "Mr. Knapp's classes are orderly and informative. He spends much time in his coaching duties."

At the beginning of the 1980-81 academic year, Knapp continued to express concern over the mileage allowance provided for Woodruff coaches, as well as the liability insurance coverage for coaches and volunteer parents in the School District who transported student-athletes in their private vehicles. According to Knapp, he had been informed of "a one million dollar umbrella policy carried by the district, that [coaches] were responsible for the first million dollar [sic] of coverage and then the School Board would pick up the remainder." Knapp further believed that the School District's insurance policy did not cover those parents who voluntarily transported student-athletes to school-related events.[3] As the 1980-81 school year progressed, Knapp joined with other teachers of the Peoria School District in demanding that a revised grievance procedure be included in the collective bargaining agreement then being negotiated between the teacher's union and the School District. On October 20,

[3] Ill. Rev. Stat. ch. 122 §§ 10-20.20, 10-22.34 (1983) provide that a School District must indemnify and protect all School District employees and authorized volunteer personnel against "death and bodily injury and property damage claims and suits, including defense thereof, when damages are sought for negligent or wrongful acts alleged to have been committed in the scope of employment or under the direction of the board." The record reveals, however, that no administrative officials of the Peoria School District nor members of the Peoria School Board informed Knapp of the state-mandated indemnification policy until after commencement of this lawsuit.

1980, Knapp attended a meeting of the Peoria Board of Education ("School Board") where Board member Cleaver "asked teachers to let her know if the [grievance] policy was not working." In response to this request, Knapp contacted another Board member, Dr. Glover, about "an administrative policy or decision that was made at Woodruff High School and it was related to mileage for coaches and insurance for coaches or parents or students who transported students." Knapp also contacted Board member Hoerr to discuss the mileage allowance for coaches at Woodruff, the liability insurance provided by the School District, and the change in his classroom assignment. Hoerr added that Knapp:

> "also expressed a great deal of concern and criticism of the administration of the high school, who were not receptive to his complaints and whom he felt were not giving him satisifaction in terms of the grievance procedure and he was not getting the desired effect that he felt was due him."

On March 24, 1981, Knapp filed a formal grievance with the School District on the issue of liability insurance and the issue of inequitable mileage allowance for Woodruff coaches. According to Knapp:

> "District No. 150 is discriminating against the coaching staff by paying some coaches 12¢ per mile and not paying some at all, while other traveling is reimbursed at 20¢ per mile. The grievant also charges that the District is placing coaches in a perilous position by requiring them to drive to and from game situations at their own risk without the protection of liability insurance for those duties."

Pursuant to Board Policy 4116.2 of Peoria School District No. 150, the first step of the grievance procedure is to discuss the problem "with the aggrieved person's principal with the objective of resolving the matter informally." If the grievant is not satisfied with the principal's decision, he may proceed to the second level and submit

the grievance to the Committee on Professional Rights and Responsibilities. If the grievant remains unsatisfied with the Committee's ruling he may appeal the decision to a body composed of the superintendent and a three person grievance subcommittee. Finally, if the grievant is still not satisfied with the result, he may present his claim to the Peoria School Board. In compliance with level one of the grievance procedure, principal McDavid reviewed Knapp's complaint and on March 27, 1981, McDavid informed Knapp, in writing, that "the situations did not qualify as 'grievances' under the definition of 'grievance' in Board Policy 4116.2." The relevant section provides that "[a] 'grievance' is a condition in the school system which an individual teacher believes is wrong, unjust, or oppressive, but excluding issues such as changes in salary and policy of the Board of Education which relates to teachers as a whole." McDavid denied the grievance, concluding that Knapp's claims were "class actions" relating to coaches as a whole.

Following receipt of principal McDavid's response, Knapp contacted members of the Peoria School Board seeking sponsorship to speak at the next School Board meeting, scheduled for April 6, 1981.[4] Knapp mailed a copy of his March 24 grievance to each Board member and enclosed a note stating that "I have talked to [board members] Dr. Glover and Mr. Hoerr concerning the material included. I will be in touch early next week." Harry Whitaker, the superintendent of District 150, learned of Knapp's contacts with Board members and on April 1, 1981, he met with Knapp to inform him that under Board Policy 2111.10(11) of the Peoria School District, communications to the Board must be directed through the superintendent.[5] According to Whitaker, he informed

[4] Board Policy 1120.10 of Peoria School District No. 150, provides that an individual must receive sponsorship from at least one Board member in order to address the Board about an item not appearing on the official agenda.

[5] Board Policy 2111.10(11) of Peoria School District No. 150

(Footnote continued on following page)

Knapp that the "Board policy that covers the superintendent of schools says that . . . all communications to the Board members will go through the superintendent." Knapp claims that he was told "[i]f you ever contact a board member about any educational issue, I will find you insubordinate and act accordingly." Following this meeting, Whitaker sent a "privileged communication" to each School Board member, providing in relevant part:

> "I asked for a meeting with Terry and met with him this morning. I pointed out that Board Policy 2111.10, Superintendent of Schools, Item # 11 states 'communicate, or cause to be communicated to all employees all actions of the Board relating to the several employees, and all communications made to the Board shall be through him.' I pointed out that this wasn't the first time that he was outside of Board policy and from now on communication with the Board should go through the superintendent. He was very argumentative, as always, and said that Board members encouraged him to call them, write them, etc. and that he was going to pay attention to the Board members. I again pointed out to him that he is outside of Board policy and that I expected him to stay within Board policy.
>
> If Terry continues to bypass the administration with regard to communications, I am going to recommend his dismissal."

The next day, April 2, 1981, superintendent Whitaker placed a letter in Knapp's personnel file summarizing the content of the April 1 conversation and stating in pertinent part:

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[5] *continued*

provides that the superintendent shall "[c]ommunicate, or cause to be communicated, to all employees, all actions of the Board relating to the several employees, and all communications made to the Board shall be through [the superintendent]."

> "I asked for the conference with Terry to point out to him that he is in violation of Board Policy 2111.10 which deals with communications being made to Board members without first sending those communication [sic] to the superintendent of schools. This has been taking place for some time and I have not been concerned. However I believe now it has become somewhat of a problem. I asked Terry at the conference to stay within Board policy. I don't believe that he was aware that he was in violation of Board policy and I believe he will not deliberately violate the policy in the future. He has been asked to remediate this aspect of his conduct."

On Friday, April 3, 1981, Knapp approached principal McDavid and asked, in writing, for a "personal day" with pay, for the following Monday, because "I would like to use Monday April 6 to consult my lawyer about threats made to me by Mr. Harry Whitaker concerning my job." Pursuant to Administrative Procedure 4152.7 of the Peoria School District, "[t]he principal or immediate supervisor may grant an employee a maximum of two days per year for urgent and compelling personal business which cannot be conducted at any other time." McDavid explained that Knapp could see an attorney during non-school hours and thus the principal denied the request. Knapp responded that in light of his April 1 conversation with superintendent Whitaker, he feared that he would be fired for insubordination. Knapp added, in writing, that "[t]his has to be done for my personal protection before Monday's [April 6] board meeting. This is the only time my lawyer was free." McDavid phoned assistant superintendent Burdette and asked for his advice. Burdette knew that Knapp was not about to be fired, as such an action would have to be approved by the office of the assistant superintendent, and thus Burdette saw no compelling or "pressing reason that we should pay a teacher to see a lawyer under these conditions." McDavid formally denied Knapp's request and instructed him to return to class. During the following period Knapp became dizzy

and nauseous, experiencing severe pains in his chest and arms that he believed to be warning signs of a heart attack. Knapp was transported, by a fellow Woodruff teacher, to the doctor's office where he was examined, given a prescription for medication, and instructed to rest for the weekend.

The following Monday, April 6, 1981, Knapp appeared at the School Board meeting, distributed an eleven page statement to each Board member, and informed the Board, in his prepared and oral remarks, that the grievance procedure was functioning ineffectively. As a specific example, Knapp related that principal McDavid denied his March 24 grievance—on the issues of the inequitable mileage allowance for Woodruff coaches and the School District's liability insurance policy—because the claims were non-grievable. In response to Knapp's statement, assistant superintendent Burdette, "outlined the exact steps of a Grievance Procedure. If the complaint is grievable, the final level is the Board of Education. If the administration feels the complaint is not grievable, nothing more happens." In addition, superintendent Whitaker explained to the School Board members that under the terms of the present collective bargaining agreement in District 150, "a complaint is not grievable if a teacher is not treated differently from other teachers in the building."

Following the School Board meeting, Knapp returned to Woodruff where he continued to teach biology courses and serve as an assistant baseball coach. On April 24, 1981, Knapp filed a second grievance with the School District, this time claiming that:

> "On April 2, 1981 I submitted a written request for a personal day for legal matters. The day asked for was April 6, 1981. On April 3, 1981 the request was denied by my principal. It is my understanding that legal days are a part of my contract as a valid personal day."[6]

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[6] According to Administrative Procedure 4152.7 of the Peoria

(Footnote continued on following page)

Principal McDavid reviewed the request and responded, in writing, that "this was not a grievable item." The next day, Saturday, April 25, 1981, Knapp coached a double-header baseball game and in the locker room afterward, he removed his elastic stocking only to observe an abnormal swelling in the upper calf region of his right leg. On the following Monday, April 27, 1981, Knapp visited a general practitioner, Dr. Lawless, who diagnosed the condition as phlebitis. Dr. Lawless prescribed medication and recommended that Knapp elevate the leg while resting at home for the remainder of the week.

On Wednesday, April 29, 1981, administrative assistant Hatton completed a year-end evaluation of Knapp, stating that:

> "Mr. Knapp spends too much time dwelling upon negative issues. He spends a great deal of time each day berating the performance of other faculty members, members of the administration of Woodruff, and the central administrative staff. He is consistently undermining the policies, procedures and general effectiveness of this school and the school district. This has a damaging effect in both the school and community.
>
> * * *
>
> On several occasions he has contacted school board members concerning personal employment problems. Problems of this nature are to be discussed with the building principal or, as stated in Board Policy 2111.10, to the office of the superintendent. Mr. Knapp is to refrain from contacting board members or speaking at public meetings concerning his personal employment relationships.
>
> He is, however, allowed to contact board members about matters of general public interest. His insist-

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[6] *continued*

School District, "legal proceedings or legal transactions" are sufficient reasons for granting a "personal day" with pay.

> ence on airing personal problems directly with the board is disruptive and will not be tolerated.
>
> In conclusion, if the above stated problems are remediated and Mr. Knapp tends to the business of teaching, the potential exists for him to become a good teacher. It is hoped that he will correct his problems and live up to his potential. The members of the administration stand ready to assist him in a normal manner to correct these problems."

In addition, Hatton recommended that Knapp be placed on remediation status, meaning that Knapp's employment would continue as long as he corrected the problems alluded to in the evaluation. Two days later, on Friday, May 1, 1981, Knapp returned to school to discuss a lesson plan with his substitute teacher and to retrieve some papers from his classroom. While checking his intra-office mail, Knapp learned that Hatton had completed the evaluation and wanted to discuss the content with him. Hatton presented the evaluation to Knapp who read it, became infuriated, and complained that "my leg started throbbing, my hands were sweating, my face was sweating, my intestines were cramping." Knapp claims that when he proceeded to the door of Hatton's office, the administrative assistant told him, "you cannot leave this office without signing this evaluation right now." According to Hatton, he informed Knapp that "you're not supposed to leave without signing this evaluation. It doesn't mean that you agree with it."

On Monday, May 4, 1981, Knapp did not return to Woodruff but had his union representative file a third grievance with the Peoria School District, claiming that:

> "Pursuant to the Board's Grievance Policy no individual shall be punished nor harassed for attempting to implement the grievance procedure. I am filing a grievance because of the continued harassment I have received since filing my original grievance. I have been harassed for filing grievances to the point that

> my health is being impaired and my ability to function as a classroom teacher is being greatly impaired. I have filed two previous grievances. The first dealt with inequitable mileage compensation and lack of adequate liability coverage. The second grievance was filed because my Principal denied me a personal day for legal councel [sic] stemming from the first grievance and ensuing harassment.
>
> The harassment can be summarized to date as:
>
> 1. Superintendent Whitaker's threats and remediation for communicating with Board members.
>
> 2. Dr. McDavid's denial of a personal day for legal use.
>
> 3. Mr. Hatton's grossly unfair teacher evaluation.
>
> 4. Mr. Hatton's curricular reassignment for next year.
>
> 5. Mr. Hatton's threat that I must sign my evaluation before I could leave his office and his follow-up denial in front of Mr. Clemmer."

On May 8, 1981, Knapp again visited Dr. Lawless complaining of recurring nausea, loss of appetite, vomiting, and headaches, along with pain in his right leg. Dr. Lawless diagnosed Knapp as suffering from acute anxiety and arranged for Knapp to meet with a psychologist, to evaluate the anxiety condition, as well as a vascular surgeon, to determine the severity of Knapp's phlebitis condition. Finally, Dr. Lawless recommended to Knapp's superiors that he be placed on a temporary leave of absence.

Knapp did not return to Woodruff for the remainder of the 1980-81 academic year. In June 1981, during the summer vacation period, principal McDavid phoned Knapp to discuss the phlebitis condition and to determine Knapp's ability to serve as an assistant baseball coach at Woodruff for the upcoming 1981-82 school year. McDavid

informed Knapp that "I really need someone that is healthy and reliable." Knapp responded that:

> "I was currently seeing a psychologist and a cardio-vascular surgeon and that at that present time the cardio-vascular surgeon scheduled a venogram to determine the extent of the phlebitical condition that I had at that time, and I was to have the venogram and then he would consider whether or not surgery was necessary. So I told him basically 'surgery is possible at this time.'"

According to Knapp, he further informed McDavid that "[t]he doctor said even if I require surgery or stripping a vein, that it shouldn't be any problem and that I would be able to resume my coaching duties in the spring." At the close of this conversation, McDavid relieved Knapp of his assistant baseball coaching position, noting that:

> "The different factors basically were, of course, he was at that time telling me that he couldn't coach baseball because baseball was causing illness, phlebitis. Along with that was reliability which I consider basically the same thing, I didn't know whether he was going to be there or not, which caused some problem with his other coaching—having to take his teams to games, and so forth. Basically I'd have to say that some of it went really back to the past year when he resigned his [basketball] coaching position. I was very unhappy about that and I think Terry and I talked about that after it was over . . . ."

In August 1981, Knapp received a medical release to return to his teaching duties and upon arrival at Woodruff, he learned that his schedule no longer included study-hall supervision, a position for which teachers in District 150 receive extra compensation. On November 12, 1981, Knapp filed the instant lawsuit, alleging, *inter alia*, that the defendants, "acting in concert, have commenced a plan and course of action to penalize Plaintiff for his exercise of the First Amendment right to make known his

views on matters of public importance in a lawful and legitimate manner," in violation of 42 U.S.C. § 1983. During the course of the 1981-82 academic year, it became evident that the Peoria School District would have to dismiss between 140 and 160 teachers the following year "due to declining enrollment and economic conditions." As a result, the School District terminated many non-tenured teachers and transferred numerous tenured teachers, based chiefly upon their years of seniority within a department, to other schools within the District. Knapp had accumulated the least amount of seniority among the five teachers in the science department at Woodruff High School. Thus, on April 13, 1982, Byron McCormick, personnel director for the Peoria schools, informed Knapp, in writing, that "unless unforseen changes occur, it will be necessary to transfer you to a different building assignment, effective with the 1982-83 school year." Following receipt of this letter, Knapp sought interviews at Peoria Central High School where teachers with coaching experience were needed in the science, health, and phsycial education departments. According to assistant superintendent Burdette, the principal at Peoria Central "did not think it was necessary to interview [Knapp] because he knew [Knapp] and, being a veteran coach and administrator in our district, was well aware of [Knapp's] coaching experience."

On April 29, 1982, administrative assistant Hatton completed another year-end evaluation of Knapp, stating, in relevant part, that:

> "Mr. Knapp was issued a 'remediation required' category on his evaluation for last year. He appears at this time to have satisfactorily resolved most of the deficiencies that were cited on this evaluation.
>
> While I still feel that Mr. Knapp's attitude is a problem, it is difficult for me to evaluate as I am currently a defendant in a lawsuit in which he is the plaintiff. I can no longer be impartial, therefore, I will not comment on this area."

On May 4, 1982, Knapp filed a fourth grievance with the district, this time complaining that Hatton's evaluation

failed to "follow the board's own procedure in evaluation of remediated teachers." Assistant superintendent Burdette responded in a letter of May 6, 1982, that:

> "Your latest grievance alleging harrassment [sic] as a result of the April 29th evaluation report appears to us to be nothing more than a thinly veiled attempt to fabricate evidence in support of your lawsuit against this district. Mr. Hatton gave you a satisfactory evaluation that requires no remediation. Since you were formally evaluated last year, it was not necessary to adhere to the formal evaluation procedures this year. Mr. Hatton is required by Board Policy to evaluate you. This evaluation procedure is Board Policy and is not grievable by you or any other employee. Accordingly, the matters raised in the grievance are not grievable."

On May 19, 1982, Knapp filed another grievance on the very same topic—Hatton's April 29 evaluation—which was again denied. Burdette informed Knapp, in writing, that the grievance "certainly appears to be an attempt to harass the administration at a time when their attention is needed to the many things necessary to have a successful conclusion of the school year for our students."

On July 16, 1982, the personnel director of the Peoria schools sent Knapp another letter, this time informing him that he was officially transferred to Harrison Grade School where he would teach science and math at the seventh and eighth grade levels. On July 27, 1982, Knapp submitted a fifth grievance, protesting "my involuntary transfer from Woodruff High School to Harrison Grade School." Knapp alleged that "had I not been improperly fired from coaching Sophmore baseball I would still be assigned next year to Woodruff." In support of this claim Knapp cited three examples of teachers at Woodruff, who held coaching positions, that were not transferred despite the fact they had less seniority than other teachers within their respective departments. Knapp further claimed that "I was never granted an interview for any of the

three positions at Peoria High . . . nor was I granted any interviews that would better match my background and certifications." Knapp presented the grievance to principal McDavid at level one, assistant superintendent Burdette and the Professional Rights and Responsibilities Committee at level two, and superintendent Whitaker at level three. Knapp's claim was considered grievable but was denied at all three levels on the basis that the School District acted properly.

On November 22, 1982, one year after the filing of this civil rights lawsuit and some three months after entry of the final pretrial order, Knapp requested leave to amend his complaint to include a claim for punitive damages. On December 17, 1982, the district court denied the request because "substantial prejudice will result to the Defendants if the Plaintiff is permitted to add a punitive damage claim." The case proceeded to trial and at the close of the evidence on February 1, 1983, the district judge ruled, from the bench, that "the speech involved in this case, the contact with the Board members orally, I mean over the phone in their homes, at the Board meeting, which is already admitted and even the transmittal to them of written documents is protected speech" under the First Amendment. In accord with this legal ruling, the court instructed the jury that:

> "The court finds that School Board Regulation 2111.11 [sic] directing that communications to Board members be made through the Office of the Superintendent is unenforceable. The actions by Terry Knapp in speaking to Board members, both individually and at a public meeting, were protected by the First Amendment of the Constitution of the United States.
>
> The court also finds that the following conduct violated Terry Knapp's rights:
>
> 1. The oral reprimand given to Terry Knapp by Harry Whitaker on April 1, 1981.
>
> 2. The language contained in the memorandum written by Harry Whitaker to the Board of Education

of District 150 on April 1, 1981 referring to Terry Knapp's violation of Board policy.

3. The written reprimand prepared on April 2 by Harry Whitaker and given to Terry Knapp on April 6.

4. The language placed in Terry Knapp's April 29, 1981, evaluation referring to his violation of Board policy."

The court further instructed the jury that based upon the evidence presented, they were to answer the following specific interrogatories:

"1. Was the plaintiff's constitutionally protected conduct a substantial or motivating factor in the defendants' decision to transfer plaintiff to Harrison School? . . .

2. Would the defendants have taken the same action even if the plaintiff had not engaged in constitutionally protected conduct?

* * *

1. Was the plaintiff's constitutionally protected conduct a substantial or motivating factor in the defendants' decision to deny plaintiff a personal leave day with pay? . . .

2. Would the defendants have taken the same action even if the plaintiff had not engaged in constitutionally protected conduct?

* * *

1. Was the plaintiff's constitutionally protected conduct a substantial or motivating factor in the defendants' decision to give plaintiff negative evaluations? . . .

2. Would the defendants have taken the same action even if the plaintiff had not engaged in constitutionally protected conduct?

* * *

1. Was the plaintiff's constitutionally protected conduct a substantial or motivating factor in the defendants' decision to remove him as assistant baseball coach? . . .

2. Would the defendants have taken the same action even if the plaintiff had not engaged in constitutionally protected conduct?"

The jury found that Knapp's constitutionally protected speech was a substantial or motivating factor in each of the defendants' four decisions and that the defendants would not have taken such action if Knapp had not engaged in such speech. Based upon these findings, the jury awarded Knapp $514,333 in compensatory damages. On March 30, 1983, the district court granted Knapp the following equitable relief:

> "All copies of written memoranda dated April 1, 1981, and April 2, 1981, and all references to any violation of Board Policy 2111.10 by Plaintiff are to be expunged from all files maintained by the Defendants.
>
> All copies of the evaluation of Plaintiff dated April 29, 1981, and April 29, 1982, authored by John Hatton and all documentation in support thereof be removed from all files maintained by the Defendants.
>
> * * *
>
> Plaintiff shall be transferred from Harrison Grade School to Woodruff High School and shall be reassigned duties as assistant baseball coach."

The court stayed the equitable relief order, pending appeal, directing that the expunged material be delivered to the defendants' counsel and that the defendants notify the district court of any vacancies occurring at Woodruff High School.

On April 22, 1983, the defendants filed a notice of appeal in this court and in an unpublished order of June 30, 1983, we remanded the case for reconsideration in light

of the Supreme Court's decision in *Connick v. Myers*, 461 U.S. 138 (1983) ("*Connick*"). On remand, the district court ruled, *inter alia*, that "while *Connick* may be factually distinguishable from our case, even the application of the principles set forth in *Connick* do not support a change in any earlier rulings by this court." According to the court, "Mr. Knapp's speech, with its focus on the operation of the grievance procedure, was a matter of public concern." The defendants appeal the district court's ruling that Knapp engaged in constitutionally protected speech, the sufficiency of the evidence introduced at trial, the alleged trial errors, and the legal and equitable relief awarded. Knapp cross-appeals the district court's refusal to permit a punitive damage claim.

II

A. PROTECTED SPEECH

The defendants initially contend that the district court erred in ruling, as a matter of law, that Knapp's speech to members of the Peoria School Board was a matter of public concern protected under the First Amendment. According to the defendants, Knapp's speech focused only upon the job-related, personal issues of classroom assignment, evaluation content, mileage allowance for coaches at Woodruff, liability insurance for coaches and volunteer parents of School District 150, and the grievance procedure as it related to Knapp's particular disputes. The defendants rely upon the Supreme Court's language in *Connick* that:

> "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior."

461 U.S. at 147. The defendants claim that Knapp's speech was not a matter of public concern and thus was not protected by the First Amendment.

We begin our analysis with the Supreme Court's decision in *Pickering v. Board of Education*, 391 U.S. 563 (1968) ("*Pickering*"). In that case, a public high school teacher was dismissed for submitting, to the editor of a local newspaper, a factually inaccurate letter that criticized the local School Board for its past allocation of bond revenues and the local school superintendent for attempting to prevent teachers from opposing a newly proposed bond issuance. The Court ruled that the teacher's speech was a matter of "legitimate public concern on which . . . free and open debate is vital to informed decision-making by the electorate." *Id.* at 571-72. The court further reasoned that:

> "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

Id. at 568. *See also Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 414 (1979); *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 284 (1977). In balancing the competing interests, the Court considered that the teacher's speech was not directed toward anyone with whom he had daily contact; the speech did not affect harmony among co-workers or the maintenance of discipline by immediate superiors; and the teacher's employment relationship with the School Board and the superintendent did not require personal loyalty and confidence for proper functioning. In view of this evidence, the Court ruled that "absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment." *Pickering*, 391 U.S. at 574 (footnote omitted).

More recently, the Supreme Court in *Connick* refined the method for analyzing a case involving the First Amendment rights of a public employee. In *Connick*, an assistant district attorney was dismissed for insubordination after she circulated a questionnaire concerning internal office affairs. The questionnaire attempted to solicit staff members' views on the office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns. In considering the assistant district attorney's claim that distribution of the questionnaire was protected speech under the First Amendment, the Supreme Court explained that the constitutional analysis involves a two-step process. *See Yoggerst v. Hedges*, 739 F.2d 293, 295 (7th Cir. 1984). The initial inquiry is whether the speech is a matter of public concern, for "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Connick*, 461 U.S. at 146. If the speech is deemed a matter of public concern, the court must then engage in the *Pickering* balancing test, weighing the interest of the public employee, as a citizen, in commenting upon matters of public concern with the interest of the State, as an employer, in promoting effective and efficient public service. The Supreme Court added that "[t]he inquiry into the protective status of speech is one of law, not fact." *Id.* at 148 n.7.

Within this analytical framework, the Court established that "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48. In *Connick*, the Court considered that none of the questions, except the one about pressure to work in political campaigns, sought to evaluate the District Attorney's performance as

an elected official; inform the public that the District Attorney's office was failing to discharge its governmental duties; or expose potential wrongdoing or breach of the public trust. Accordingly, the Court held that the questions were nothing more than one employee's dissatisfaction with office procedures that did "not fall under the rubric of matters of 'public concern.' " *Id.* at 148. The Court ruled, however, that "the issue of whether assistant district attorneys are pressured to work in political campaigns is a matter of interest to the community upon which it is essential that public employees be able to speak freely without fear of retaliatory dismissal." *Id.* at 149. Because the question of political campaign pressure involved a matter of public concern, the Court proceeded to the second analytical step—the *Pickering* balancing test—weighing the plaintiff's interest in discussing matters of public concern with the interest of the District Attorney's office in providing efficient services for the public. The Court considered numerous factors, including (1) whether the speech impeded the employee's ability to perform her responsibilities; (2) the importance of close working relationships with superiors and co-workers; (3) the time, place, and manner in which the speech was delivered; and (4) the context in which the underlying dispute arose. *Id.* at 150-54. *See also Zook v. Brown*, 748 F.2d 1161, 1166 (7th Cir. 1984); *McGee v. Jim Hogg County, Tex.*, 730 F.2d 1009, 1013 (5th Cir. 1984). Based upon these factors, the Court concluded that:

> "Myers' questionnaire touched upon matters of public concern in only a most limited sense; her survey, in our view, is most accurately characterized as an employee grievance concerning internal office policy. The limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships."

Connick, 461 U.S. at 154.

In the present case, the issue is whether Knapp's oral and written communications with members of the Peoria School Board are matters of public concern, protected under the First Amendment. We realize, of course, that "[b]ecause of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors . . . to furnish grounds for dismissal, . . . [there exists no] general standard against which all such statements may be judged." *Pickering*, 391 U.S. at 569. *See also Egger v. Phillips*, 710 F.2d 292, 315 (7th Cir.) (*en banc*), *cert. denied*, 104 S. Ct. 284 (1983). In resolving Knapp's claim that the Peoria School District infringed upon his constitutional right to free speech, we are guided by the Supreme Court's analysis in *Pickering* and *Connick*. The record indicates that Knapp contacted School Board members concerning his classroom assignment; the content of administrative assistant Hatton's evaluations; the inequitable mileage allowance for Woodruff coaches; the liability insurance provided by Peoria School District No. 150 for coaches and volunteer parents who transport student-athletes to school-related activities; and the general ineffectiveness of the grievance procedure within District 150. The issues of Knapp's classroom assignment and the content of his evaluations are clearly personal matters relating solely to Knapp's employment at Woodruff. Knapp's speech on these issues was not an attempt to inform the public that the administrators in District 150 were failing to discharge their governmental responsibilities. Moreover, Knapp's speech on these subjects was not aimed at uncovering a wrongdoing or breach of the public trust among Peoria School District administrators. Instead, Knapp simply disagreed with certain internal decisions made by his immediate superiors at Woodruff High School. While principal McDavid, as a matter of good judgment, should have been receptive to any constructive criticism offered by Knapp, "the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs." *Connick*, 461 U.S. at 149. Accordingly, based upon the content, form, and

context of Knapp's complaints about classroom assignment and evaluation content, we hold that such speech is a matter of personal concern, not a matter of public concern.

The issue of inequitable mileage allowance involves not only Knapp but all of the coaches at Woodruff who travel to area high schools to scout opposing teams and who transport student-athletes to school-related events in their own vehicles. According to the established policy in District 150, each high school maintains a separate athletic budget to pay for such items as uniforms, equipment, and coaches' travel expenses. These athletic budgets generally consist of public funds distributed by the School District, as well as monies collected from athletic booster clubs, fundraisers, and gate receipts. At Woodruff, a substantial portion of the athletic budget ($10,000) consisted of public funds received from the Peoria School District. The comptroller of District 150 informed principal McDavid of the possibility that these funds may be cut for the 1979-80 academic year, and thus McDavid independently decided upon a 12¢ per mile reimbursement figure for Woodruff coaches. Knapp protested, on behalf of all coaches at Woodruff, that McDavid's decision was unfair as coaches at other Peoria public high schools received 20¢ per mile for travel expenses. In the context of this case, Knapp's complaint focused upon the inequitable allocation of public funds to a select group of Peoria area high school coaches. Indeed, McDavid testified that in computing the 12¢ per mile figure, he contacted three other high school principals in District 150 and discovered that "there was a difference from school to school" on the mileage allowance for coaches. The School District offered no explanation for the inequalities in athletic-related travel reimbursement nor did it promulgate any regulation to assure that public funds earmarked for athletic budgets be distributed evenly to coaches throughout the District. Knapp's speech to the School Board on the issue of mileage allowance was an attempt to inform the public and the educational policymakers of Peoria that officials in District 150 were failing in their duty to properly administer the allocation